

**Before the  
United States Copyright Royalty Judges  
Library of Congress**

In the Matter of:

Copyright Royalty Board Regulations  
Regarding Procedures for Determination and  
Allocation of Assessment to Fund Mechanical  
Licensing Collective and Other Amendments  
Required by the Hatch-Goodlatte Music  
Modernization Act

Docket No. 18-CRB-0012-RM

**COMMENTS OF SOUNDEXCHANGE, INC.**

SoundExchange, Inc. (“SoundExchange”) is pleased to provide these comments in response to the Copyright Royalty Judges’ Proposed Rule concerning modifications to the regulations under the Section 112 and 114 statutory licenses to reflect the Hatch-Goodlatte Music Modernization Act (“MMA”). 84 Fed. Reg. 9053 (Mar. 13, 2019).<sup>1</sup>

SoundExchange appreciates the Judges’ inclusion of its proposals in the Proposed Rule, and believes that specifically reflecting protection for pre-1972 recordings in the regulations under the Section 112 and 114 statutory licenses will contribute to achieving the Judges’ long-expressed goal of having regulations that are clear, understandable and straightforward to administer. *See Web II*, 72 Fed. Reg. 24,084, 24,102 (May 1, 2007) (“Adopting a set of terms whose operation is not practical, or creates additional unjustified costs and/or inefficiencies, is inconsistent with the precepts of statutory licensing, and we must avoid such circumstances.”);

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<sup>1</sup> These Comments do not address aspects of the Proposed Rule relating to the Section 115 compulsory license.

*see also SDARS III*, 83 Fed. Reg. 65,210, 65,261 (Dec. 19, 2018) (seeking to avoid “counterintuitive” regulations); *Web IV*, 81 Fed. Reg. 26,316 n.1 (May 2, 2016) (regulations revised “in the interests of plain language”). If the Judges were to retain their current regulations without addressing the treatment of pre-1972 recordings in the MMA, a licensee would need to be familiar with Section 1401(b) to understand that the regulations should not be taken literally insofar as they appear to exclude pre-1972 recordings. Such a circumstance would risk confusion and potential underpayment by licensees, with a potential need for retroactive correction. That would be impractical and inefficient, and is the antithesis of what the Judges have said they aspire to in their regulations. Accordingly, the Judges should adopt provisions for the treatment of pre-1972 recordings under Sections 112 and 114 that are substantially as set forth in the Proposed Rule.

SoundExchange provides these Comments to address the Judges’ questions concerning its proposals. SoundExchange also identifies two technical corrections that should be made if the Judges adopt the Proposed Rule.<sup>2</sup>

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<sup>2</sup> SoundExchange further takes this opportunity to renew the request made in its letter of November 20, 2018 that the Judges take action in Docket No. 14-CRB-0005 RM concerning its authority to use proxy data to distribute statutory royalties in cases in which a licensee never provides a usable report of use. It is important to update the Judges’ regulations to reflect the MMA as proposed here to provide a clear framework for legacy artists and copyright owners of pre-1972 recordings to be paid when their works are used. However, it is also important to recognize that despite the requirements of Part 370, which are proposed to be updated here, there has always been a small percentage of statutory royalty payments for which SoundExchange is never able to obtain a report of use. Because the Judges’ rate regulations require SoundExchange to distribute royalties based on reports of use, some of which never arrive, undistributable statutory royalties continue to accumulate. SoundExchange urges the Judges to take prompt action to liberate this money, since this situation is also far from the kind of practical and efficient result the Judges have said they want. Specifically, SoundExchange asks that the Judges promptly grant SoundExchange proxy distribution authority as proposed in Docket No. 14-CRB-0005 RM, or at least amend 37 C.F.R. §§ 370.3(i) and 370.4(f) to permit the distribution of otherwise undistributable royalties paid for the years through 2017.

### **Definition of Copyright Owner**

The Proposed Rule incorporates SoundExchange's proposal to clarify in the Judges' notice and recordkeeping regulations and rate regulations that rights owners as defined in Section 1401(l)(2) are to be treated the same as copyright owners for statutory license purposes. *See* 17 U.S.C. § 1401(b). SoundExchange's proposal accomplished that result by adding a definition of copyright owners in Part 370, and modifying existing definitions of copyright owner(s) in Parts 380, 382, 383 and 384, to include rights owners under Section 1401(l)(2). This proposal was designed to achieve the kinds of clear, understandable, plain-English regulations that the Judges have said they want, without extensive revisions to regulations that extend across over 40 pages of the Code of Federal Regulations and include well over 100 references to copyright owners. It was also designed to comport with common usage, which has always referred to owners of rights in pre-1972 recordings as copyright owners, because such recordings were until the MMA protected by common law copyright.

SoundExchange does not believe that using this approach would have any unintended consequences. Under the MMA, rights owners as defined in Section 1401(l)(2) are to be treated the same as copyright owners for statutory license purposes. *See* 17 U.S.C. § 1401(b). That is exactly the result achieved by SoundExchange's proposal. The Judges suggest a concern that the language proposed by SoundExchange might be inconsistent with Section 101 or imply that rights owners of pre-1972 recordings have different rights than granted by the Copyright Act. *See* 84 Fed. Reg. at 9060. However, the Judges obviously do not have the power to vest pre-1972 recordings with full copyright protection (where they do not have that under Section 104A), and it is difficult to imagine anyone thinking, for example, that the rights owner of a pre-1972 recording has the right to register a copyright under Section 408(a) (when under Section

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1401 it does not) simply because rights owners are included within the definition of copyright owner in the Judges' statutory license regulations. Section 1401 is quite clear about what rights do, and do not, come with being a rights owner under Section 1401(l)(2).

Further, the definitions of copyright owner in the Proposed Rule clearly treat rights owners as distinct from copyright owners. SoundExchange does not believe that anyone could reasonably see the references to both copyright owners and rights owners within those definitions and infer that those two concepts are redundant and mean the same thing for all purposes under the Copyright Act. Nonetheless, if the Judges wished to make the distinction between those two categories even more abundantly clear, a minimalist way to do so would be to include a reference to Section 101 in each of the definitions of copyright owner. For example, in the case of proposed Section 370.1:

*Copyright Owners* means sound recording copyright owners under 17 U.S.C. 101, and rights owners under 17 U.S.C. 1401(l)(2), who are entitled to royalty payments made pursuant to the statutory licenses under 17 U.S.C. 112(e) and 114.

A less satisfactory alternative would be to adopt a term that is neither copyright owner nor rights owner to refer to the group of copyright owners and rights owners, and then use that term throughout the regulations. However, it is not obvious what that term might be; such a term would be less consistent with common parlance, and hence more opaque, than the term copyright owner; and substituting that term for the term copyright owner each place it appears would require extensive revisions to the regulations. That would achieve the goal of reflecting the MMA in the regulations, but otherwise does not seem like a desirable outcome.

## **SDARS Pre-1972 Deduction**

The Proposed Rule also incorporates SoundExchange’s proposal to remove from the SDARS rate regulations the provisions concerning a royalty deduction for use of pre-1972 recordings. Those provisions are entirely inoperative for the next several years. Beyond that time, they will have little or no relevance and are misdescriptive. Post-MMA, the situation with respect to pre-1972 recordings is very different than the one the Judges were trying to address when they created the current pre-1972 deduction. In view of the MMA, that deduction should be deleted or at least tailored to reflect current law.

The Judges express a concern that Sirius XM might play public domain recordings, and give as examples of those foreign-origin recordings protected under Section 104A for “which protection has since expired in their country of origin, or after January 1, 2022, pre-1923 U.S. sound recordings.” 84 Fed. Reg. at 9061. However, the first of those categories is inapposite. All pre-1972 recordings are currently protected under Section 1401 (and in some cases Section 104A as well). The rights conferred by Section 1401 have no exception based on country of origin or public domain status in any other country. See 17 U.S.C. § 1401(a).<sup>3</sup>

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<sup>3</sup> This state of affairs reflects the practical reality that it is somewhat complicated to determine which pre-1972 recordings were restored works. See 17 U.S.C. § 104A(h)(6). Thus, for example, SoundExchange is not aware of any attempt by Sirius XM to do so. SoundExchange notes that the Judges’ reference to expiration of protection in the country of origin seems based on a misreading of Section 104A(h)(6)(B). That provision means that federal copyright protection was only “restored” by Section 104A to foreign works that were protected in their country of origin on the date of restoration. In general, that was January 1, 1996. 17 U.S.C. § 104A(h)(2). Once restored, the term of protection for a restored work is the U.S. copyright term, not the copyright term of the country of origin. 17 U.S.C. § 104A(a)(1)(B). It is not apparent to SoundExchange that Sirius XM uses any foreign-origin works that might have been restored, and that are old enough to have had their U.S. copyright term expire, but to the extent it does, Section 1401(a) now protects them.

The Judges are correct to note that beginning in 2022, there will be sound recordings in the public domain. SoundExchange can't say as a matter of principle that statutory royalties should be paid for use of such recordings, although it is concerned that Sirius XM may misapply a pre-1972 deduction, or even a more narrowly tailored public domain deduction, if one remains in the Judges' regulations. In the context of an actual SDARS service rather than an academic debate, the possibility of Sirius XM's using public domain recordings seems more theoretical than real. The recordings that will be in the public domain during the current SDARS rate period are roughly a century or more old:

<b>Year</b>	<b>Recordings in the Public Domain</b>
2019	None
2020	None
2021	None
2022	Recordings published before 1923
2023	Recordings published before 1923
2024	Recordings published before 1924
2025	Recordings published before 1925
2026	Recordings published before 1926
2027	Recordings published before 1927

*See* 17 U.S.C. § 1401(a)(2).

By contrast, Sirius XM's SDARS is a consumer-oriented entertainment service that has limited satellite bandwidth and channel capacity. As a result, and as Sirius XM's top music programming executive has testified to the Judges, the channels it provides are "listener-driven." Written Direct Testimony of Steven Blatter in Docket No. 2011-1 CRB PSS/Satellite II ¶ 27 (Nov. 28, 2011). Thus, Sirius XM strives to "create meaningful and satisfactory channel options for the subscriber" with a "listening experience more engaging to the target audience." *Id.* ¶ 9. As is evident from the channel listing attached as Exhibit A, Sirius XM does that by using its limited satellite capacity to provide genre-based programming featuring currently popular

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recordings that appeal to the musical tastes of its subscribers. Overwhelmingly that means music recorded since 1972.

To be sure, Sirius XM offers a number of “oldies” music channels that are decade-based, but the oldest of those plays recordings from the 1940s, and in the last few years that programming has been demoted from a prominent placement on channel 4 to the much less conspicuous channel 73. *See* Exhibit A. It will be more than 20 years before any 1940s recordings enter the public domain. By that time, it is quite possible that Sirius XM’s 1940s channel will have given way to a new channel featuring recordings that have not yet been made. The handful of other Sirius XM genre channels that make significant use of pre-1972 recordings largely feature post-1956 recordings, such as recordings by the Beatles and Elvis, and classic rock recordings, that will be protected under Section 1401 for almost 50 more years. *See* Exhibit A; 17 U.S.C. § 1401(a)(2)(B)(iv). Recordings from the 1920s are only occasionally featured on Sirius XM’s service, particularly on its jazz and blues channels.

SoundExchange doubts that Sirius XM plays any or many original century-old recordings. A version of a 1920s recording that was remixed or remastered for digital release under circumstances that involved the creation of an original derivative work has copyright protection for a full copyright term. Thus, even when Sirius XM plays what might appear on its face to be a century-old recording, it may not actually be one. A play of a public domain recording might well have to be sourced from a scratchy, monaural 78 rpm shellac record. In one recent case against a terrestrial radio broadcaster, the court observed that the broadcaster “does not use any analog sound recordings; it exclusively relies on digitally mastered or remastered sound recordings.” *ABS Entertainment, Inc. v. CBS Corp.*, 908 F.3d 405, 411 (9th

Cir. 2018). For the relatively small set of famous 1920s recordings Sirius XM uses, it seems likely that Sirius XM does the same.

Nonetheless, to assess the possible extent of Sirius XM's use of the century-old recordings that will be in the public domain by the end of the current rate period, SoundExchange tried to identify such recordings used by Sirius XM in a recent month. Out of over a million sound recording plays during the month, SoundExchange found only a handful of plays that seemed *potentially* to involve recordings originally released before 1923. That implies that for 2022 and 2023 (assuming no programming changes by then), only some 0.0005% of Sirius XM's usage would potentially be of public domain recordings. SoundExchange found dozens of plays of what could *potentially* be pre-1927 recordings, which again assuming no programming changes, implies that by the last year of the current rate period, about 0.006% of Sirius XM's usage would potentially be of public domain recordings. Further, it bears emphasis that these percentages refer to Sirius XM's usage of recordings that could *potentially* be in the public domain by the end of the rate period based on the original release date of a recording of the relevant song by the relevant artist. In evaluating the possibility that Sirius XM might *actually* play a public domain recording, one must remember that Sirius XM may be using a version of a 1920s recording that was remixed or remastered for digital release under circumstances that involved the creation of a derivative work entitled to copyright protection.<sup>4</sup>

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<sup>4</sup> It is also possible that Sirius XM might use a later recording of the same song by the same artist. For example, while a recording of Louis Armstrong performing "Muskrat Ramble" was originally released in 1926, he recorded the song multiple times in the decades that followed. In the analysis above, a Louis Armstrong recording of "Muskrat Ramble" is treated as one potentially entering the public domain in 2027, even if Sirius XM actually used a later recording that would not enter the public domain during the rate period.



The foregoing illustrates that Sirius XM's usage of recordings that will enter the public domain between 2022 and 2027 is at most inconsequential, and quite possibly nonexistent. The possibility that Sirius XM might occasionally play an original century-old recording is a very different situation than the one the Judges were trying to address when they created the pre-1972 deduction. At that time, they understood that 10-15% of Sirius XM's actual, not theoretical, usage was of pre-1972 recordings. *SDARS II*, 78 Fed. Reg. 23,054, 23,071 (Apr. 17, 2013). However, post-MMA, the vast majority of commercially-important pre-72 recordings will be federally-protected for many years. The extent of Sirius XM's potential use of century-old recordings is very different from its actual use of pre-1972 recordings, since the 1920s long predate the Beatles, Elvis, big band and classic rock, to which Sirius XM devotes whole channels. The pre-1972 deduction is inoperative today and will have no material effect during the current rate period.

As noted above, SoundExchange can't say as a matter of principle that statutory royalties should be paid if Sirius XM were actually to use a public domain recording, although it is concerned that Sirius XM may misapply any permissible deduction. If the Judges were inclined to allow for the theoretical possibility of an adjustment to SDARS royalty payments based on use of original century-old recordings later in the rate period, the current language of the pre-1972 deduction is not the way to do it if the Judges' goal is to provide regulations that are clear and understandable. Someone reading the regulations would naturally think that a royalty deduction is available today and for recordings "fixed before February 15, 1972." 37 C.F.R. § 382.20. However, the truth is that no deduction at all is available through 2021, and in 2022 and 2023 a deduction would only apply to original recordings published before 1923. That cut-off then shifts in annual increments for the rest of the rate period. *See* 17 U.S.C. § 1401(a)(2). If the Comments of SoundExchange, Inc.

Judges are inclined to implement an adjustment for use of century-old recordings, they should describe that adjustment accurately in their regulations.

### **Technical Corrections**

While SoundExchange urges the Judges to modify their regulations under Sections 112 and 114 substantially as set forth the Proposed Rule, SoundExchange respectfully suggests two technical corrections:

1. In the authority citation for Part 370, the reference to Section “114(f)(4)(A)” should be replaced by a reference to Section “114(f)(3)(A)” to reflect the renumbering of the paragraphs of Section 114(f) in the MMA.

2. In proposed Section 383.2(b), which defines a singular “Copyright Owner,” the word “and” should be replaced by “or,” because the defined term Copyright Owner may refer to either a copyright owner or a rights owner under Section 1401(l)(2). A particular entity does not need to be both a copyright owner and a rights owner under Section 1401(l)(2) to be a Copyright Owner. (This is not an issue in the Proposed Rule’s various definitions of plural “Copyright Owners.”)

### **CONCLUSION**

SoundExchange appreciates the opportunity to provide these Comments and urges the Judges to adopt substantially the Proposed Rule.

April 12, 2019

Respectfully submitted,

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**Exhibit A**

**SDARS Music Channel Listing**

## POP

02		Today's Pop Hits
03		Pop Music You Can Move to
04		Discover Amazing Channels
05		Pop Hits
06		Pop Hits with Cousin Brucie
07		Pop Hits with American Top 40
08		Pop Hits with Original MTV VJs
09		Pop Hits with Downtown Julie Brown
10		2000s Pop Hits
13		Worldwide Rhythmic Hits
14		Acoustic/Singer-Songwriters
15		Today's Adult Hits
16		Bright Pop Hits
17		Rock & Pop from the '90s & 2000s
158		Hot Latin Hits

## ROCK

18		The Fab Four, 24/7
19		Elvis 24/7 Live from Graceland
20		Bruce Springsteen, 24/7
21		Little Steven's Garage Rock
22		Pearl Jam, 24/7
23		Grateful Dead, 24/7
24		Escape to Margaritaville
25		'70s/'80s Classic Rock
26		'60s/'70s Classic Rock
27		Deep Classic Rock
28		Classic Rock Meets New Rock
29		Jam Bands
31		Music from Rock Icon Tom Petty
32		Mellow Classic Rock
33		Classic Alternative

## COMMERCIAL-FREE MUSIC

34		'90s Alternative/Grunge
35		Indie & Beyond
36		New Alternative Rock
37		New Hard Rock
38		Ozzy's Classic Hard Rock
39		'80s Hair Bands
40		Heavy Metal
41		'90s/2000s Hard Rock

## HIP-HOP/R&B

42		Reggae
43		LL COOL J's Classic Hip-Hop
44		Today's Hip-Hop Hits
45		Eminem's Hip-Hop Channel
46		Today's R&B Hits
47		'90s & 2000s Hip-Hop/R&B
48		Adult R&B Hits
49		Classic Soul/Motown
50		'70s/'80s R&B

## DANCE & ELECTRONIC

51		Electronic Dance Music Hits
52		Global Rhythm Vibes
53		Downtempo/Deep House
54		'70s – 2000s Dance Hits

## COUNTRY

55		Garth's Own Channel, 24/7
56		Today's Country Hits
57		Kenny Chesney's Music Channel
58		'80s/'90s Country Hits
59		Willie's Classic Country
60		Rockin' Country Rebels
61		2000s Country Hits

62		Bluegrass
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## CHRISTIAN

63		Christian Pop & Rock
64		Kirk Franklin's Gospel Channel
65		Southern Gospel

## JAZZ/STANDARDS

66		Smooth/Contemporary Jazz
67		Classic Jazz
68		New Age
69		Easy Listening
70		Love Songs
71		Standards by Sinatra & More
72		Show Tunes
73		'40s Pop Hits/Big Band
74		B.B. King's Blues Channel

## CLASSICAL

75		Opera/Classical Vocals
76		Classical Music

## FAMILY

77		Pop Hits Sung by Kids for Kids
78		Kids' Music
79		Pop Hits for the Entire Family

## TRAFFIC & WEATHER

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